IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 271

CASSIUS MARCELLUS CLAY, JR., also known as MUHAMMAD ALI, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

MOTION FOR LEAVE TO AMEND PETITION FOR WRIT OF CERTIORARI, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

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Printed by Byron S. Adams Printing, Inc., Washington, D.C.

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Petitioner moves the Court to allow him to amend his petition for writ of certiorari by adding and including the following at the end of p. 21 thereof; or, in the alternative, for leave to file the following as a supplemental brief to his pending petition for writ of certiorari pursuant to rule 24(5), *Rules of The Supreme Court of the United States:*[1]

[1] "Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing."

1. The Court of Appeals for the Fifth Circuit, since filing of the petition for writ of certiorari herein, decided *Sellers* v. *McNamara,* 1 S.S.L.R. 3155 (No. 24654, 5th Cir. July 23, 1968); a copy of the opinion therein is attached hereto as an appendix at pp. 1a-5a.

In a separate opinion (in effect, a dissent) from that opinion which held that the appellant, Sellers, was not entitled to relief from the systematic exclusion of Negroes from his selective service boards, Judge Tuttle said: "[T]he statute and the Constitution of the United States do forbid the practice which produces selective service boards of an entire state whose members are substantially all white, while classifying and ordering into service citizens of the state, approximately one third of whom are Negroes." (4a)

Judge Tuttle, while acknowledging that the law of the Fifth Circuit had been established in *Clay* concerning the de facto acts of draft boards, suggested that the *Clay* rationale is not necessarily the law of the United States: "[I]f this decision is wrong it is subject to review by the Supreme Court." (3a)

Judge Tuttle then proceeded to distinguish *Sellers* on procedural grounds, pointing out that the racial composition of draft boards was subject to direct attack. Petitioner Clay challenged, as did Sellers, the racial composition of his selective service boards by direct attack prior to induction. *Muhammad Ali* v. *Breathitt,* 268 F. Supp. 63 (W.D. Ky.), *stay of induction and writ of mandamus denied,* No. 17,787 (6th Cir., Apr. 17, 1967), *stay, injunction, and mandamus denied,* 386 U.S. 1002, *cert. denied,* 386 U.S. 1018, *reh. denied,* 386 U.S. 1027 (1967); *Muhammad Ali* v. *Connally,* 266 F. Supp. 345 (S.D. Tex. 1967), *stay and injunction*

denied, No. 24,714 (5th Cir., May 11, 1967). Then he sought to enjoin prosecution. *Muhammad Ali* v. *Connally,* Civ. No. 67-H-333 (S.D. Tex., May 1, 1967), *stay and injunction denied,* No. 24,723 (5th Cir., May 1, 1967 and May 11, 1967). Then, after indictment, a writ of prohibition was unsuccessfully sought. *Muhammad Ali* v. *Connally,* No. 24,750 (5th Cir., May 15, 1967). See the opinion of the court of appeals at 7a-11a, appendix to original petition herein.

Further, note 1 of the separate opinion necessarily constitutes a recording of Judge Tuttle's dissent from the court of appeals' decision in *Clay.*[2]

Also see Mr. Justice Black's opinion ordering Sellers' release on bail pending appeal of his criminal conviction: "I am unable to say that a challenge to draft boards of this kind would be dismissed by this court as frivolous." *Sellers* v. *United States,* 37 U.S.L.W. 2117 (Black, Circuit Justice, August 17, 1968).

Should the court find that petitioner has a right not to be drafted by a board from which Negroes have been systematically excluded, his conviction for failure to obey the order of induction should be reversed. In the alternative, if this court finds that a civil injunction against induction to be proper remedy for the enforcement of petitioner's right, then this court should order a reversal of petitioner's conviction since his remedy

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[2] The footnote reads in full:

> This results from the fact that the petition by Clay for a rehearing of his appeal en banc was denied by the court under the provisions of 28 U.S.C.A. § 46(c) following my retirement, and I was not a member of the court who was eligible to vote for en banc rehearing or note my dissent from the court's denial of the petition. (3a)

was denied him by the courts below and by denial in this Court of a stay of petitioner's induction. See *Muhammad Ali* v. *Gordon*, 386 U.S. 1002 (1967).

Additional cases presently pending decision here or in other courts which involve the question of systematic exclusion of Negroes from the Selective Service System are: *Sellers* v. *McNamara, supra*, (petition for certiorari filed contemporaneously herewith); *Nelloms* v. *United States, petition for cert. filed*, Misc. No. 781, Aug. 30, 1968; *Sumrall* v. *United States, petition for cert. filed*, Aug. 19, 1968; *United States* v. *Brooks, appeal docketed* 6th Cir., May 9, 1968. See also the petition for certiorari herein at 8 n. 4.

Respectfully submitted,

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